

# “When you have to shoot, shoot!” Rethinking the right to life of combatants during armed conflicts

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## Abstract

*Does targeting combatants really provide a military advantage during an armed conflict? The limitations on the use of force against civilians and means and methods of warfare are well developed under contemporary international humanitarian law*

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(IHL), but the issue of targetability of adversary combatants remains underdeveloped. This paper builds on contemporary developments in international human rights law and moral just war theory to offer a revised *lex ferenda* look at the basic principles of IHL through the internalization of the value of the lives of combatants. It is argued that such a reading of IHL would allow for a rejection of the automatic necessity of targeting combatants, and hence give due consideration to the value of life of combatants (both adversary combatants and own combatants) in the evaluation of the use of force during armed conflicts, including through reduced military advantage, force protection, and adjusted proportionality analysis.

**Keywords:** international humanitarian law, international human rights law, right to life, combatants, international armed conflicts.

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## Introduction

“When you have to shoot, shoot! Don’t talk.” This is the quip famously uttered by Tuco (played by Eli Wallach) in *The Good, the Bad and the Ugly*,<sup>1</sup> and it often reflects the situation on the battlefield between combatants under international humanitarian law (IHL). In fact, unless combatants become protected under a particular set of rules, such as when they become *hors de combat*, they are considered a legitimate object of attack at all times during an armed conflict – i.e., when they sleep, eat, play ball with other combatants, or even, like Tuco in the referenced scene, take a bath.

Combatants are expected to willingly risk their lives to complete whatever mission they have been ordered to accomplish (with the exception of acting upon manifestly illegal orders). Once a person joins the armed forces and becomes a combatant, they “forfeit” some elements of control over their lives, including the decision of when to expose themselves to severe risks.

Consider, for example, the “Highway of Death” incident in the 1990–1991 Gulf War in Iraq, on 26–27 February 1991. While Iraqi forces were withdrawing from Kuwait, US forces received small-arms fire from that direction. In response, two hours after that initial attack, US forces attacked a five-mile-long retreating Iraqi column. They first attacked the vehicles leading the retreating troops, thus generating a traffic jam, and then continued with a full-scale attack on the column. As a result of the attack, thirty-four tanks, 224 trucks, forty-one armoured personnel carriers, forty-three artillery pieces and 319 anti-tank guns were destroyed, with an estimated 400 Iraqi soldiers killed.<sup>2</sup>

While the notion of accepting some elements of real risk to life and limb is not a common feature of everyone’s life, it is by no means unique to combatants:

1 *The Good, the Bad and the Ugly*, Produzioni Europee Associati, 1966.

2 Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, pp. 281–282; Gabriella Blum, “The Dispensable Lives of Soldiers”, *Journal of Legal Analysis*, Vol. 2, No. 1, 2010, p. 112. This example and others that appear in the paper will be used to exemplify the suggested models.

firefighters and police officers are also required to bear significant and even life-threatening risks as part of their regular profession.<sup>3</sup> What sets combatants apart from the other risk-taking professionals is that combatants are the only ones who have a separate legal framework specifically governing their operations in the face of danger – on the battlefield. They are also considered legitimate targets solely because of their combatant status.<sup>4</sup>

Leaving aside limitations on means and methods in the conduct of hostilities,<sup>5</sup> IHL does not provide any positive indication for limiting the use of force against combatants with a view to reducing the threat to life to combatants in general or preferring their lives when the choice is between human life and military objects. Even the controversial Section IX of the International Committee of the Red Cross (ICRC) *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Interpretive Guidance), which reiterates a requirement to avoid unnecessary suffering of combatants,<sup>6</sup> notes the lack of relevancy in classic large-scale confrontations between well-equipped and well-organized armed forces or groups,<sup>7</sup> and links the increased considerations of humanity with an increased level of effective territorial control.<sup>8</sup>

In this paper, I focus on combatants’ status-based “license to kill and be killed” during armed conflict, especially in international armed conflicts, and its consequences for their right to life under international law. As was noted by the United Nations (UN) Human Rights Committee in its General Comment 36, a State is obligated under international human rights law (IHRL) to protect the right to life for all individuals under its jurisdiction, and that obligation continues during armed conflicts.<sup>9</sup> According to the Human Rights Committee, this obligation also applies extraterritorially – i.e., to foreign nationals under the effective control of the State.<sup>10</sup> Therefore, there is no reason to exclude *a priori* combatants from the scope of persons who enjoy the right to life even on the

3 G. Blum, above note 2, p. 86.

4 *Ibid.*

5 See Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, TS No. 539, 1 Bevans 63 1, 36 Stat. 2277, 18 October 1907 (Hague Regulations); Hague Declaration (III) concerning the Prohibition of the Use of Expanding Bullets, 187 Consol. TS 459, 29 July 1899.

6 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretive Guidance), pp. 77–78. The Guidance discusses a wider framework than just combatants, but since the focus of this paper is on combatants, I maintain the discussion from that perspective alone.

7 *Ibid.*, p. 80.

8 *Ibid.*, p. 81.

9 Human Rights Committee, “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life”, UN Doc. CCPR/C/GC/36, 30 October 2018 (General Comment 36), para. 64.

10 Human Rights Committee, General Comment No. 31, “Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10; European Court of Human Rights (ECtHR), *Issa and Others v. Turkey*, Appl. No. 31821/96, Judgment, 16 November 2004; ECtHR, *Al-Skeini and Others v. United Kingdom*, Appl. No. 55721/07, 7 July 2011; General Comment 36, above note 9, para. 63.

battlefield if the conditions for effective control are met. Put differently, the main question examined in this paper is what constitutes “arbitrary deprivation of life” of combatants in accordance with IHL.<sup>11</sup> The existence of the right to life for combatants is one of the normative points of departure for this paper. I pursue this normative approach, juxtaposing it against the understanding that under the current reading and interpretation of IHL norms, the life of combatants does not play a major factor therein, if at all. The following three scenarios illustrate the points under discussion:

- **Scenario A** includes two targets of equal military value,<sup>12</sup> and only one target can be pursued. Target 1 is one combatant – an F-35 pilot. Target 2 is one military object – an F-35. The attack is expected to either kill the combatant or destroy the F-35.
- **Scenario B** also includes two targets of equal military value. Target 1 is ten special forces combatants and ten civilians. Target 2 is 100 unmanned aerial vehicle (UAV) operators (including both assault and intelligence UAVs) and ten civilians. The attack is expected to kill all of them and the civilian collateral damage is not expected to be excessive.
- **Scenario C** again includes two targets of equal military value. Target 1 is ten special forces combatants and twenty uninvolved civilians. Target 2 is 100 UAV operators and ten uninvolved civilians. The attack is expected to kill all of them and, again, the civilian collateral damage is not expected to be excessive.

When we ignore any potential external considerations that might affect the military advantage bestowed by the attacks and the collateral damage caused by them, and focus solely on the theoretical scenarios, we can acknowledge that while IHL provides certain limitations on the means and methods of warfare employed, it offers no legal indication in the choice between Target 1 and Target 2 in Scenarios A and B. According to IHL, when there is a choice between two targets with the same military value, the attack must be conducted against the target that is expected to cause the least collateral damage.<sup>13</sup> However, when there is no expected collateral damage, IHL provides no preference or prioritization between damage to human life (Target A1) and an object (Target A2). Moreover, for that matter, it does not make any difference if A1 includes one pilot or 100 pilots as long as the military value remains the same for both targets. The same lack of preference or indication extends to Scenario B – despite the understanding that choosing Target B2 will lead to a larger number of human casualties, IHL

11 Note that related issues concerning extraterritorial application of IHRL have been covered in literature in abundance and as such will not be further discussed here. For a good overview, see e.g. Ian Park, *The Right to Life in Armed Conflict*, Oxford University Press, Oxford, 2018.

12 The “equal military value” aspect is used for the purpose of all three scenarios. Military value refers to the advantage to the military from targeting either option, and equal military value is meant to demonstrate that when we evaluate proportionality, there is no difference between the two targets in terms of the concrete and direct military advantage to be gained.

13 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 57(3).

provides no guidance when the collateral damage from both targets is equal. On the other hand, when collateral damage to the civilian population becomes relevant (Scenario C), IHL is very clear and holds that between two equal-value targets, the attacker is required to do anything feasible to avoid or at least minimize such collateral damage.<sup>14</sup> Therefore, Target C2 (ten uninvolved civilians) must be chosen over Target C1 (twenty uninvolved civilians) regardless of the considerably larger amount of cumulative human casualties in C2 compared to C1.<sup>15</sup>

I suggest that developments which have taken place in international law (especially regarding the co-application of IHL and IHRL, but also in technology) and just war theory require a rethinking of the approach towards the right to life of combatants as a relevant factor under IHL during military operations. In the paper I offer a balanced and practical *lex ferenda* reading of the notion of combatants’ right to life as part of IHL-based decision-making processes and not as an external IHRL norm. The first section of this paper discusses reasons for taking a new approach toward the right to life of combatants during armed conflict on the basis of the co-application of IHL and IHRL and the humanization of IHL, and explains why internalization of that notion within the basic principles of IHL through reinterpretation might be the best option. The second section suggests how the right to life of combatants can be practically incorporated into the basic principles of IHL through such a reinterpretation, while maintaining the fundamental balance between military necessity and humanity as well as the cardinal principle of distinction. The third section explicates how the approach advanced in this paper influences specific rules and the treatment of adversary combatants and one’s own combatants. The fourth section addresses potential concerns about the practical implementation of such an approach, and finally, the fifth section offers some concluding remarks.

## Rethinking the approach toward the lives of combatants during armed conflict

Under IHL, the focus with regard to the right to life of combatants is about the conduct of hostilities. The application of the right to life protections in armed conflict is seemingly excluded from the most fundamental action of warfare – the

<sup>14</sup> *Ibid.*

<sup>15</sup> It should be noted that according to a more expansive reading of the proportionality rule, which holds that as long as everything was done to avoid or minimize the relevant collateral damage and the expected collateral damage is not excessive, there is no preference between the two targets. See e.g. Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, Martinus Nijhoff, Leiden, 2009, pp. 198–199; Rogier Bartels, “Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials”, *Israel Law Review*, Vol. 46, No. 2, 2013, p. 306. Under such a reading, Scenario C could be read alongside Scenario B. However, for the sake of a more comprehensive argument I will continue with the understanding that IHL requires the attacker to choose target C2 over C1.

killing of combatants during an international armed conflict is not considered arbitrary deprivation of the right to life. Since under IHL, a combatant can be targeted at any given time,<sup>16</sup> the immediate outcome is that when using legal means and methods of attack against adversary combatants, no additional right to life considerations are required.<sup>17</sup>

Using IHRL in the context of an armed conflict to fill IHL lacunas and as an interpretive tool has led to some progress in the humanization of IHL.<sup>18</sup> Nevertheless, the humanization of IHL has so far failed to adequately address the right to life of combatants on the battlefield.<sup>19</sup> The most relevant development in this context took place regarding the regulation of weapons causing unnecessary suffering and the use of indiscriminate weapons.<sup>20</sup> Another aspect of the humanization of IHL can be seen in the introduction of IHRL elements into different aspects of IHL,<sup>21</sup> such as clarifying the terms of detention and the right to a fair trial.<sup>22</sup> Nevertheless, these developments have not touched directly on the most basic and fundamental presumption under IHL that combatants can be targeted at any given time (unless *hors de combat*).<sup>23</sup>

This understanding of combatants' targetability has been challenged in recent years, mainly by the just war revisionists and some legal scholars. The just war revisionists question the equality and symmetry between just and unjust combatants,<sup>24</sup> and hold that the legitimacy of conduct under *jus ad bellum* should affect the status of the combatants under *jus in bello*.<sup>25</sup> More recently,

16 See Marko Milanovic, "Norm Conflicts, International Humanitarian Law, and Human Rights Law", in Orna Ben Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford 2011, pp. 118–119 – unless *hors de combat*.

17 Vera Gowlland-Debbas, "The Right to Life and the Relationship between Human Rights and Humanitarian Law", in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life*, Brill Nijhoff, Leiden, 2010, p. 130.

18 Theodor Meron, *The Humanization of international Law*, Martinus Nijhoff, Leiden, 2006, pp. 1–9; Theodor Meron, "The Humanization of Humanitarian Law", *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 239.

19 T. Meron, *The Humanization of International Law*, above note 18, p. 28.

20 Michael A. Newton and Larry May, *Proportionality in International Law*, Oxford University Press, New York, 2014, p. 122. While the limitations on certain types of weapons date back to the St. Petersburg Declaration, additional limitations and prohibitions have been introduced throughout the years, and even today there are discussions about the limitations that should be placed on future weapons such as fully autonomous weapons.

21 David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", *European Journal of International Law*, Vol. 16, No. 2, 2005, p. 171; T. Meron, "The Humanization of Humanitarian Law", above note 18, p. 239; Yuval Shany, "Co-Application and Harmonization of IHL and IHRL: Are Rumours about the Death of *Lex Specialis* Premature?", in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives*, ElgarOnline, May 2022, pp. 4–5.

22 Louise Doswald-Beck, "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?", *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 881–882.

23 M. Milanovic, above note 16.

24 Jeff McMahan, "The Morality of War and the Law of War", in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, Oxford University Press, Oxford, 2008, p. 26; David Rodin, "The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry is Half Right", in D. Rodin and H. Shue (eds), above, p. 46. See also the discussion in Andrew Clapham, *War*, Oxford University Press, Oxford, 2021, p. 19.

25 J. McMahan, above note 24.

the notion of the “license to kill” has also been challenged from a legal perspective by arguing that IHL contains no positive clause which provides such a license,<sup>26</sup> and that IHL merely provides combatants with immunity for operating in accordance with IHL.

Still, these developments in IHL do not address scenarios in which the lives of combatants (who are not *hors de combat*) might be a relevant factor, such as the three “equal military value” scenarios presented earlier, or others like the “Highway of Death” and the famous naked soldier scenario.<sup>27</sup> By contrast, the potential legal implications of these scenarios might be different if the lives of the combatants were to be taken into consideration in such problematic situations. Alas, although IHL rules regarding the protection of civilians and combatants *hors de combat* have developed, this has not been the case regarding the life of combatants during the conduct of hostilities and especially on the battlefield, and IHL *lex lata* has remained essentially the same since the nineteenth century.<sup>28</sup>

At the same time, and especially in recent decades, the reality of warfare has changed significantly – especially from the strategic and technological perspectives.<sup>29</sup> If, in the past, the goal of States was to win by numbers, and having a large military force provided them with a strong advantage, today States invest significant amounts of money in advanced technology and equipment.<sup>30</sup> While such technological developments have led to changes regarding certain limitations and restrictions on the means and methods of warfare, they also ought to cause us to rethink the “automatic” military necessity of targeting every combatant just on the basis of their combatant status.<sup>31</sup> In line with developments in the co-application of IHRL and IHL, and in the context of the right to life, IHRL is an apt legal tool for such potential change.

Nevertheless, since risk is an embedded element in the role and status of combatants,<sup>32</sup> the implementation of the right to life must be interpreted within the context and framework of IHL and the reality of an armed conflict.

26 A. Clapham, above note 24, pp. 267–268; Kubo Mačák, “A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 45, 2015, p. 93; Anne Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?*, Edwar Elgar, Cheltenham, 2020 (demonstrating the legitimacy of attacking combatants under IHL). See also the discussion below on military necessity for more about this topic.

27 Would it be legitimate to shoot a German soldier bathing in a lake during World War II despite the lack of any immediate apparent threat to the British forces surrounding him? See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed., Basic Books, New York, 2006, pp. 138–140.

28 G. Blum, above note 2, pp. 71, 76.

29 Jakob Kellenberger, “Keynote International Humanitarian Law and New Weapon Technologies, 34th Round Table on Current Issues of International Humanitarian Law, San Remo, 8–10 September 2011”, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, p. 809.

30 Michael E. O’Hanlon, *A Retrospective on the So-Called Revolution in Military Affairs, 2000–2020*, Brookings Institution, 2018, available at: [www.brookings.edu/articles/a-retrospective-on-the-so-called-revolution-in-military-affairs-2000-2020](http://www.brookings.edu/articles/a-retrospective-on-the-so-called-revolution-in-military-affairs-2000-2020) (all internet references were accessed in April 2024).

31 G. Blum, above note 2, p. 73.

32 Peter Rowe, *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, 2005, p. 30; UK Supreme Court (UKSC), *Smith and Others (FC) (Appellants) v. The Ministry of Defence (Respondent)*, [2013] UKSC 41, 19 June 2013, paras 61–62; ECtHR, *Soering v. UK*, [1989] 11 EHRR 439, 1989, para. 439; House of Lords, *R (Gentle and Another) v. Prime Minister*, [2008] UKHL 20, [2008] AC 1356, 2008, para. 9; ECtHR, *Stoyanovi v. Bulgaria*, Appl. No. 42980/04, 9 November 2010, para. 61.



Therefore, a legal development is required to take the right to life of combatants into account during the conduct of hostilities.<sup>33</sup>

Some argue that the solution to the right to life of combatants comes from adopting the approach of just war revisionists, and thus via the moral justification and legality of the use of force under *jus ad bellum*.<sup>34</sup> This approach is, however, impractical.<sup>35</sup> One reason for the impracticality of the linkage between *jus ad bellum* and *jus in bello* is the lack of *ex ante* clarity about who is the just side in a conflict.<sup>36</sup> Although the Human Rights Committee took a step in the direction of the just war revisionists' approach by including an innuendo about the interplay between paragraphs 64 and 70 of its General Comment 36,<sup>37</sup> the criticism about the *ex post facto* analysis of the situation remains applicable.<sup>38</sup> Therefore, even such an advanced approach as that presented in General Comment 36 only deals with the consequences in hindsight.<sup>39</sup>

The suggested solution applies a mixed legal framework that combines IHL and IHRL and applies them to battlefield conditions, while maintaining the fundamental principles of IHL. This framework provides an alternative interpretation of IHL and its basic principles by including the right to life of combatants without altering the underlying framework, allowing us to consider the right to life of combatants as part of the conduct of hostilities even if we maintain the *lex specialis* approach for the interplay between IHL and IHRL. It is based on a fresh understanding of military necessity as "the necessity of those measures ... [that] are lawful according to the modern law and usages of war",<sup>40</sup> and challenges the existing *lex lata* approach to the lives of combatants in hostilities as a flawed one.

The approach unfolded in this paper is based on reading IHRL norms into IHL as another step in the humanization of IHL.<sup>41</sup> While such internalization is not new to IHL, it has not been successfully used in the context of active combatants (i.e., those not *hors de combat*). One very notable attempt to internalize the right to life of combatants into IHL norms was during the discussions over Section IX of the ICRC Interpretive Guidance.<sup>42</sup> The supporting approach was based on

33 G. Blum, above note 2, pp. 73–74; M. A. Newton and L. May, above note 20, p. 135.

34 J. McMahan, above note 24, pp. 21–22.

35 D. Rodin, above note 24, pp. 63–64; A. Clapham, above note 24, p. 277.

36 Jeff McMahan, "The Ethics of Killing in War", *Ethics*, Vol. 114, No. 4, 2004, p. 728.

37 See e.g. Eliav Lieblich, "The Humanization of Jus ad Bellum: Prospects and Perils", *European Journal of International Law*, Vol. 32, No. 2, 2021, p. 588; Ryan Goodman, Christof Heyns and Yuval Shany, "Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36", *Just Security*, 4 February 2019, available at: [www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36](http://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36).

38 Miles Jackson and Dapo Akande, "The Right to Life and the Jus ad Bellum: Belligerent Equality and the Duty to Prosecute Acts of Aggression", *International and Comparative Law Quarterly*, Vol. 71, No. 2, 2022, p. 5.

39 One could argue that the possibility of future liability might limit gratuitous harming of combatants.

40 Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, US Department of War, 24 April 1863 (Lieber Code).

41 T. Meron, "The Humanization of Humanitarian Law", above note 18, p. 239; Y. Shany, above note 21, pp. 4–5.

42 ICRC Interpretive Guidance, above note 7, pp. 77–82; Nils Melzer, *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities Geneva, 5/6 February 2008: Summary Report*, ICRC, Geneva, 2008, pp. 13–14, available at: [www.icrc.org/en/doc/assets/files/other/2008-05-report-dph-2008-icrc.pdf](http://www.icrc.org/en/doc/assets/files/other/2008-05-report-dph-2008-icrc.pdf).



using the harmonization between the right to life and basic concepts of IHL such as military necessity to claim that limitations on the use of force against combatants (e.g. the “capture rather than kill” notion) already constitute *lex lata*.<sup>43</sup> That attempt was highly criticized, both during the discussions<sup>44</sup> and after the publication of the Guidance,<sup>45</sup> as reflecting neither *lex lata* nor the *opinio juris* of States.<sup>46</sup>

Therefore, in the next section I suggest a potential alternative interpretation to the existing principles of IHL. I suggest a creative analysis of the question of how IHL would be *de facto* amended by internalizing the right to life of combatants.<sup>47</sup> This suggestion is more nuanced than Section IX of the ICRC Interpretive Guidance and holds that the right to life of combatants should be embedded as another aspect in the cumulative military considerations that are part of the conduct of hostilities, and as an integral part of IHL principles, while maintaining the fundamental notion of *jus in bello* independence from *jus ad bellum* justifications, and the fundamental legal notion of distinction between civilians and combatants.

## Incorporating the life of combatants into IHL principles

The main question is how the right to life of combatants can affect the law of armed conflict when read as part of the existing law. Exploring the effects of that right on the basic principles of IHL will help to further examine the issue at hand.

Every combatant has two aspects to their lives: a military aspect and a human aspect.<sup>48</sup> Each aspect has its own value. The military aspect is relevant from the perspective of the State’s own combatants where a combatant is an “asset” for the conduct of the military operations.<sup>49</sup> The same aspect is also relevant from the perspective of the adversary, where the combatant has an embedded military value.<sup>50</sup> Under the human aspect, combatants have an

43 N. Melzer, above note 42, pp. 14–16.

44 *Ibid.*, p. 14.

45 See the special NYU Journal symposium, with W. Hays Parks, Kenneth Watkin, Michael N. Schmitt, Bill Boothby and Nils Melzer, *NYU Journal of International Law and Policy*, Vol. 42, No. 3, 2010; Dapo Akande, “Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities”, *International and Comparative Law Quarterly*, Vol. 59, No. 1, 2010, p. 192.

46 N. Melzer, above note 42, p. 14.

47 Since the proposed approach requires a change in the interpretation of the military necessity of targeting combatants, it falls within the notion of *lex ferenda* and not *lex lata*.

48 See Ziv Bohrer and Mark Osiel, “Proportionality in Military Force at War’s Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers”, *Vanderbilt Journal of Transnational Law*, Vol. 46, No. 3, 2012, pp. 766–767; David Luban, *Risk Taking and Force Protection*, Georgetown Public Law and Legal Theory Research Paper No. 11-72, 2011, p. 36, available at: <https://scholarship.law.georgetown.edu/facpub/654>.

49 Z. Bohrer and M. Osiel, above note 48, pp. 766–767. Luban refers to the combatants from this perspective as merely “means” to an end: D. Luban, above note 48, p. 36.

50 Geoffrey S. Corn, Laurie R. Blank, Chris Jenks and Eric Talbot Jensen, “Belligerent Targeting and the Invalidity of a Least Harmful Means Rule”, *International Law Studies*, Vol. 89, No. 536, 2013, pp. 554–555.

intrinsic value – their value of life.<sup>51</sup> A main difference between the two aspects is that the military aspect is dynamic and depends on the circumstances,<sup>52</sup> while the value of life is constant.

It is important to explore the implications of introducing the combatant's right to life into IHL through the four basic principles of necessity, distinction, proportionality and humanity,<sup>53</sup> with regard to both the adversary's combatants and one's own combatants.<sup>54</sup>

## Military necessity

Some consider military necessity as a permissive function and even as the “normative basis for employing those measures necessary to bring an enemy to submission”.<sup>55</sup> Others consider it as a restrictive function which prohibits any measures that are not necessary to achieve the legitimate purpose of the armed conflict.<sup>56</sup> Regardless of the preferred interpretation, military necessity serves as the principle that allows for the targeting of military objectives and, within that, combatants.<sup>57</sup>

One of the assumptions within IHL is that attacking any combatant provides military advantage and therefore that every combatant has an embedded military value.<sup>58</sup> This leads to a presumption of targetability at all times as long as the attack takes place in the context of an armed conflict (unless the targets are *hors de combat*).<sup>59</sup> Although there is no clear positive written source for it, the approach that “[c]ombatants considered to be military objectives can be attacked even if they pose no threat to an adversary” has been generally accepted in State practice and in the literature.<sup>60</sup>

This assumption has been invoked in specific situations such as with the “Highway of Death” incident against the withdrawing Iraqi forces, referenced at the beginning of this paper. Under the common understanding and practice of IHL, the retreating Iraqi forces were legitimate targets as they did not lay down their weapons (in fact, shots were fired from their direction shortly before the attack against them) and the armed conflict was still ongoing.<sup>61</sup>

51 Luban refers to combatants from this perspective as an “end” on its own: D. Luban, above note 48, p. 36. See also Z. Bohrer and M. Osiel, above note 48, pp. 766–767.

52 G. Blum, above note 2, pp. 109–114; Z. Bohrer and M. Osiel, above note 48, pp. 766–767.

53 UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2005, p. 22, para. 2.2.1.

54 Other aspects can include for example combatants conducting law enforcement operations in situations of belligerent occupation. However, these aspects, important as they may be, provide redundant “noise” in the basic discussion, and therefore are outside of the scope of this paper.

55 G. S. Corn *et al.*, above note 50, p. 543.

56 A. Quintin, above note 26, pp. 25–26.

57 *Ibid.*, pp. 253–270.

58 G. Blum, above note 2, p. 80; G. S. Corn *et al.*, above note 50, pp. 554–555. The notion of military advantage is bound by the framework of military necessity: see e.g. Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed., Cambridge University Press, Cambridge, 2016, pp. 106–107.

59 M. Milanovic, above note 16, pp. 118–119. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, *Commentary on the Additional Protocols*, ICRC, Geneva, 1986, para. 1953.

60 Agnieszka Jachec-Neale, “The Right to Take Life: Killing and Death in Armed Conflict”, in Jon Yorke (ed.), *The Right to Life and the Value of Life*, Routledge, London, 2010, p. 127.

61 G. Blum, above note 2, pp. 157–158.

Another example is the “naked soldier” dilemma presented by Walzer: was it legitimate to shoot a German soldier bathing in a lake during World War II despite the lack of any immediate apparent threat to the British forces surrounding him?<sup>62</sup> Although the outcome might be somewhat disturbing, according to existing norms of IHL, the combatants on the “Highway of Death” and the naked soldier are considered legitimate objects of attack due to their combatant status and the lack of any of protection-conferring elements (e.g. being *hors de combat*) applicable to the situation.<sup>63</sup>

Walzer explains the moral rationale behind the embedded military value by holding that we “can only justify the killing of people we already have reason to think are liable to be killed”.<sup>64</sup> Thus, combatancy is a status-based reason for liability, as combatants are trained to fight, are equipped to fight, and must obey orders to take part in the hostilities.<sup>65</sup>

This notion has been criticized by several scholars who argue that not every combatant is “fair game” that can be targeted at all times. Pictet argued in favour of the “lesser evil” approach,<sup>66</sup> Blum has claimed that killing as many combatants as possible is no longer as important as disabling the more dangerous ones,<sup>67</sup> Beer has taken a more utilitarian approach,<sup>68</sup> and Kalshoven has argued against the so-called “license to kill”.<sup>69</sup> Just war revisionists have also argued that just combatants should not be considered fair game.<sup>70</sup>

However, Hampson has emphasized the mainstream approach regarding the embedded military value of combatants by holding that “[t]he destruction of the opposing armed forces ... does not appear to require the justification of military necessity. It is lawful by virtue of the existence of a state of war.”<sup>71</sup> Similarly, Corn holds that any operational choice to refrain is based on the authority provided by IHL to kill an adversary combatant, but there is no requirement to do so.<sup>72</sup>

62 M. Walzer, above note 27, pp. 138–140.

63 Françoise J. Hampson, “Proportionality and Necessity in the Gulf Conflict”, in *Proceedings of the ASIL Annual Meeting*, Vol. 86, 1992, p. 53.

64 M. Walzer, above note 27, p. 144.

65 *Ibid.* See also G. Blum, above note 2, pp. 91–92; M. A. Newton and L. May, above note 20, pp. 134–135.

66 Jean Pictet, *Development and Principles of International Humanitarian Law*, Vol. 2, Brill, Leiden, 1985, p. 76.

67 G. Blum, above note 2, pp. 95, 116.

68 Yishai Beer, “Humanity Considerations Cannot Reduce War’s Hazards Alone: Revitalizing the Concept of Military Necessity”, *European Journal of International Law*, Vol. 26, No. 801, 2015. See also “EJIL: Live! Professor Yishai Beer”, *YouTube*, 20 March 2016, available at: [www.youtube.com/watch?v=xAfhKMDZrAo](http://www.youtube.com/watch?v=xAfhKMDZrAo).

69 Oscar Schachter and Frits Kalshoven, “Introduction”, *Proceedings of the ASIL Annual Meeting*, Vol. 86, 1992, pp. 39–45; A. Clapham, above note 24, pp. 276–279; I. Henderson, above note 15, p. 85.

70 McMahan has sharpened this approach, arguing that just combatants can become unjust if their actions are immoral (e.g. directly attacking uninvolved civilians), and that they can thus be considered fair game in such circumstances. See J. McMahan, above note 24, pp. 21–22.

71 F. J. Hampson, above note 63, pp. 53–54; I. Henderson, above note 15, pp. 85–86.

72 Geoffrey S. Corn, “Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict”, *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, p. 80.

Another reference to this question can be found in the controversial Section IX of the ICRC Interpretive Guidance,<sup>73</sup> which stipulates that while currently there is no legal obligation to capture rather than kill regardless of the circumstances,<sup>74</sup> there is a gap between what is allowed and what is necessary.<sup>75</sup> The approach which recognizes limitations on directly attacking combatants, whether it is based on the “lesser evil”, utilitarian approach, or efficiency, is directly related to the normative understanding that combatants have a right to life and that a core value is attached to their lives. Therefore, the practical, strategic and technological developments in warfare throughout the years,<sup>76</sup> alongside developments in the co-application of IHRL and the right to life, ought to lead to a change in the approach to the targetability of combatants.<sup>77</sup>

The introduction of the value of life of the combatants into the equation provides a different perspective on the automatic targetability of combatants. As a result, the interplay between the adjusted military value under the circumstances and the constant value of the lives of the combatants affects the latter’s targetability,<sup>78</sup> and basing the targetability of combatants solely on their status, without any additional supportive necessity criteria, should be considered arbitrary deprivation of their lives.<sup>79</sup>

Acknowledging the right to life of combatants and the value of their lives requires narrowing down the scope of the targetability of combatants,<sup>80</sup> to ensure that the deprivation of their lives will only be lawful when actually necessary and thus not arbitrary. Just as the Martens Clause played a significant factor in the development and evaluation of the legality of means and methods of warfare,<sup>81</sup> it should also be a factor in the development of the targetability of combatants on the battlefield.<sup>82</sup> Section IX of the ICRC Interpretive Guidance has taken the legal discussion over combatants’ right to life one step forward by suggesting some (*lex ferenda*) limitations on the targeting of combatants through the principle of humanity.<sup>83</sup> However, since that doctrine does not provide a complete solution to the reality of warfare, there is a need for a more refined and practical approach that combines the existing military necessity of targeting combatants, on the one hand, with the value of the lives of the combatants, on the other.

73 ICRC Interpretive Guidance, above note 6, pp. 77–82.

74 *Ibid.*, p. 78.

75 *Ibid.*, p. 79. Although the ICRC Interpretive Guidance addresses mainly situations of non-international armed conflict, this general norm is applicable both to international and non-international armed conflicts.

76 G. Blum, above note 2, pp. 95, 116.

77 Torbjörn Tännsjö, *Moral Rights in Understanding Ethics*, 3rd ed., Edinburgh University Press, Edinburgh, 2013, pp. 73–74.

78 Kalshoven raised this issue in the context of the “Highway of Death”, but kept it an open question. See O. Schachter and F. Kalshoven, above note 69.

79 C. A. J. (Tony) Coady, “The Status of Combatants”, in D. Rodin and H. Shue (eds), above note 24, p. 157.

80 G. Blum, above note 2, p. 72; ICRC Interpretive Guidance, above note 6, pp. 77–82.

81 T. Meron, *The Humanization of International Law*, above note 18, p. 27.

82 M. A. Newton and L. May, above note 20, p. 128; T. Meron, *The Humanization of International Law*, above note 18, p. 28.

83 ICRC Interpretive Guidance, above note 7, p. 86; M. A. Newton and L. May, above note 20, p. 144.

Discussing the dispensable lives of combatants, Blum suggests three dimensions for re-evaluating the threat posed by a combatant: role, temporal and geographical.<sup>84</sup> These dimensions are relevant to and affect combatants’ embedded military value. I suggest an additional dimension: functional proximity. Functional proximity combines the dimensions of role and geographical proximity, and to some extent also the temporal dimension. Functional proximity shows the effect and involvement that a combatant has on the battlefield regardless of their actual geographical proximity to it, thereby providing an indication of one’s *actual* effect on the battlefield. The notion of functional proximity can be further analyzed in terms of the functional value of each combatant and a comparison between, for example, the infantry private stationed on the battlefield and the home front officer or drone operator located far away from the battlefield. At this stage, however, it is important merely to acknowledge the existence of the functional proximity element and its relevancy to the analysis of the embedded combatant’s military value.

There are a couple of situations to consider under this framework:

1. In the midst of an armed conflict (temporal dimension), the combatants’ embedded military value is allegedly at its fullest, regardless of military position (role dimension).<sup>85</sup> This is especially when the combatants are located on the actual battlefield (geographical proximity). However, even under such terms, the lower the functional proximity, the lower the embedded value.<sup>86</sup>
2. During the last hours of the conflict (temporal dimension), if all sides of the conflict know that the conflict is about to end, then if adversary combatants continue to fight until the bitter end or until the entry into force of a ceasefire agreement, their embedded value remains intact. On the other hand, if the adversary combatants have not surrendered but have stopped active fighting and are “in fact utterly defenseless” (role dimension),<sup>87</sup> or are retreating from the battlefield (geographical dimension), then even if there are sporadic attacks against one’s own forces (such as in the “Highway of Death” scenario), functional proximity can be reduced in accordance with actual operations at the time and, accordingly, the embedded value would be reduced as well.

Therefore, combatants’ status-based embedded military value that leads to the presumption of targetability<sup>88</sup> is not only refutable (in cases such as being *hors de combat*) but should be modified in accordance with the relevant functional proximity.

84 G. Blum, above note 2, pp. 109–114.

85 D. Akande, above note 45, p. 192.

86 The practicality of the ability to take a lower functional proximity into account will be discussed later on in this paper.

87 O. Schachter and F. Kalshoven, above note 69, p. 42 See also C. A. J. Coady, above note 79, p. 157.

88 G. S. Corn, above note 72, p. 84.

## Distinction

The principle of distinction is probably the anchor of IHL: the idea that there must be some sort of separation between legitimate and non-legitimate targets, objects and persons. This principle applies both to international and non-international armed conflicts, and has been recognized by the International Court of Justice (ICJ) as a cardinal principle of IHL.<sup>89</sup>

Within this paper's focus on combatants, the *lex lata* principle of distinction includes negative and positive aspects. The negative aspect requires parties to the armed conflict to refrain from directly attacking civilians (unless the latter are taking a direct part in the hostilities),<sup>90</sup> and combatants who are *hors de combat*.<sup>91</sup> The positive aspect requires the parties to the armed conflict to take measures to distinguish their own combatants from the civilian population.<sup>92</sup>

Regarding distinction, the discussion revolves around the definition and margins of *hors de combat*.<sup>93</sup> Such a discussion is indeed important, but in this paper I focus on those who are not considered *hors de combat* but are rather "active" combatants.

By introducing the value of the lives of combatants into the principle of distinction, one could worry that the outcome would blur the distinction between combatants and civilians. If the purpose is to provide a solution to the problem of unnecessary targeting of combatants within the existing legal framework,<sup>94</sup> the cardinal principle of distinction should remain intact.<sup>95</sup> Although the reduced military value might affect the targetability of a combatant, they do remain combatants under the binary model of distinction.<sup>96</sup> Nevertheless, as will be discussed in the next section, even if a combatant is targetable, proportionality considerations might undermine the lawfulness of this course of action.<sup>97</sup>

## Proportionality

Under the common understanding of IHL, collateral damage relates only to harm caused to the civilian population, and the incidental damage part of the analysis under the proportionality principle does not account for combatants.<sup>98</sup> However,

89 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 78 (Nuclear Weapons Advisory Opinion).

90 AP I, Art. 51.

91 *Ibid.*, Art. 41(1)

92 *Ibid.*, Art. 48; Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford, 2010, p. 31.

93 Ryan Goodman, "The Power to Kill or Capture Enemy Combatants", *European Journal of International Law*, Vol. 24, No. 3, 2013, p. 819; Michael S. Schmitt, "Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'", *European Journal of International Law*, Vol. 24, No. 3, 2013, p. 855.

94 G. Blum, above note 2, p. 93.

95 Nuclear Weapons Advisory Opinion, above note 89, para. 78.

96 AP I, Arts 43, 50.

97 For a discussion on the suggested proportionality model, see the next section.

98 G. Blum, above note 2, p. 85.



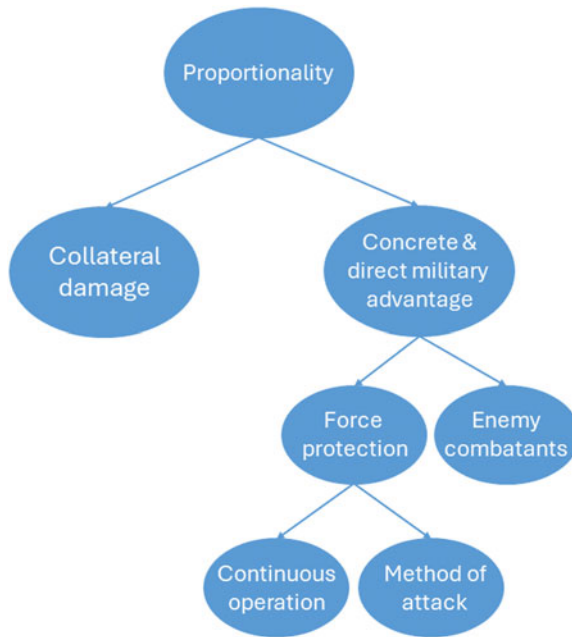


Figure 1. Proportionality *lex lata*.

on the other side of the proportionality equation – the “direct and concrete military advantage”<sup>99</sup> – there are two important aspects related to combatants: adversary combatants and force protection (see Figure 1).

Regarding adversary combatants, the common approach in the context of military advantage holds that since they are lawful targets, there is an embedded military value in targeting them. The notion of “force protection”, meanwhile, holds that preserving the lives of one’s own soldiers could, under certain circumstances, be considered part of the “concrete and direct military advantage” of an operation (see Figure 1).<sup>100</sup> This approach to force protection is considered more controversial, however.<sup>101</sup>

The concept of force protection becomes relevant mainly with regard to the choice of the method of attack, such as high-altitude aerial attacks (which result in

99 G. Blum, above note 2, p. 85; Robin Geiss, “The Principle of Proportionality: ‘Force Protection’ as a Military Advantage”, *Israel Law Review*, Vol. 45, No. 1, 2012, p. 71. But see G. Solis, above note 2, p. 285 (advocating that the lives of combatants (force protection) should be excluded as part of the proportionality analysis).

100 See e.g. New Zealand, *Manual of Armed Forces Law*, 2nd ed., Vol. 4, DM 69, 2017, para. 8.6.3(g); R. Geiss, above note 99, p. 78. Some might refer to force protection as a decision to avoid launching operations in order to protect the attacker’s own combatants from excessive risk. However, this aspect of force protection should not be included under military advantage as part of the proportionality equation, but rather should be included under the humanity principle.

101 See Y. Dinstein, above note 58, p. 106, para. 286, and p. 168, paras 449–450; R. Geiss, above note 99, p. 71; Z. Bohrer and M. Osiel, above note 48; D. Luban, above note 48; G. Solis above note 2, p. 285.

less accurate deployment of rockets but offer better protection to the pilots)<sup>102</sup> or the choice to use long-distance missiles instead of sending ground forces. Both options, while optimal from the force protection perspective, usually entail higher collateral damage.<sup>103</sup> However, the question is not whether it is plausible to view combatants' lives as a relevant consideration, but rather when we can consider the preservation of their lives as a concrete and direct military advantage.

One possible application of force protection relates to the notion that the military's strength depends on numbers of trained soldiers and that loss of soldiers erodes that strength. However, such strategic considerations cannot generally be considered as concrete or direct.<sup>104</sup> Another application is focused on the value of the combatant as an "asset" that can be used in an upcoming operation or an assignment within the same operation.<sup>105</sup> A third relevant application is when the survival of the combatants has a concrete and direct immediate military advantage on its own; for example, when a ground force is sent on a complicated mission that includes several points of attack, it is essential that the force see the mission through to the end. In such a scenario, there is an implicit direct and concrete military advantage in protecting the attacking forces and, therefore, accepting a higher level of collateral damage as non-excessive. Such an approach, however, raises valid questions about the ability of combatants to protect themselves in certain situations.<sup>106</sup>

Additional applications of force protection with regard to the lives of combatants as either an asset or a concrete and direct military advantage are the prevention of capture of a combatant by the adversary,<sup>107</sup> and the effect on general public morale and one's own forces of such acts of capture or casualties.<sup>108</sup> In this context it is crucial to distinguish between the actual prevention of capture and protecting the forces, and the effects on morale of such circumstances. It is also important to reiterate that under certain circumstances (such as a continuous military operation), the protection of the lives of

102 Y. Dinstein, above note 58, pp. 168–168; G. Solis, above note 2, p. 285.

103 While this might be in contrast with the obligation to take all feasible efforts to minimize collateral damage in accordance with the humanity principle, this section focuses on the principle of proportionality and military advantage.

104 Amichai Cohen and Yuval Shany, "Contextualizing Proportionality Analysis? A Response to Schmitt and Merriam on Israel's Targeting Practices", *Just Security*, 7 May 2015, available at: [www.justsecurity.org/22786/contextualizing-proportionality-analysis-response-schmitt-merriam](http://www.justsecurity.org/22786/contextualizing-proportionality-analysis-response-schmitt-merriam).

105 Z. Bohrer and M. Osiel, above note 48, pp. 766–767; D. Luban, above note 48, p. 36.

106 For further discussion on force protection for the purpose of self-defence, see R. Geiss, above note 99. See also Elvina Potheel and Kevin Jon Heller, "Symposium on Soldier Self-Defense and International Law: Highlighting and Framing the Issue", *Opinio Juris*, 29 April 2019, available at: <https://opiniojuris.org/2019/04/29/symposium-on-soldier-self-defense-and-international-law-highlighting-and-framing-the-issue%EF%BB%BF> (including related submissions).

107 Ziv Bohrer and Mark Osiel, "Proportionality in War, Protecting Soldiers from Enemy Captivity, and Israel's Cast Lead Operation – 'The Soldiers Are Everyone's Children'", *Southern California Interdisciplinary Law Journal*, Vol. 22, No. 3, 2013, p. 637.

108 See Maayan Lubell and Nidal Al-Mughrabi, "Did Israel's 'Hannibal Directive' Lead to a War Crime in Gaza?", *Reuters*, 13 October 2014, available at: [www.reuters.com/article/idUSKCN0I20FN](http://www.reuters.com/article/idUSKCN0I20FN); Françoise J. Hampson, "Legality of Military Activities during Operation 'Protective Edge' According to International Law", *YouTube*, 18 January 2015, available at: [www.youtube.com/watch?v=Rqz3nQhoOly](http://www.youtube.com/watch?v=Rqz3nQhoOly).

combatants could constitute a concrete and direct military advantage. Similarly, capture prevention, while a capture attempt is taking place, could serve a concrete and direct military advantage. However, any potential morale effect, while potentially military advantageous, cannot be considered concrete and direct, and therefore shall not be considered grounds to raise the collateral damage bar of the operation.<sup>109</sup>

A strong criticism of this approach is that it can lead to an infinite estimation of the military advantage, hence leading to a “zero casualty policy”<sup>110</sup> and rendering the proportionality equation void of substance. However, it should be noted that even the supporters of force protection claim that the weight of this notion is neither absolute nor indefinite.<sup>111</sup> Therefore, a “zero casualty policy” can be issued when the concrete and direct military advantage would justify it but cannot inherently override the requirement of avoiding excessive collateral damage.

If we also take into account the value of life of the combatants, then the working assumptions of proportionality must be recalibrated. Alongside their military value, the lives of combatants also have a value even when they are operating under IHL. An attack can only be directed against the combatant’s military value (and not against their lives’ value);<sup>112</sup> therefore, as derived from the IHRL negative obligation of the right to life, and especially the IHRL proportionality obligation, within the framework of an armed conflict, the value of life of adversary combatants should be internalized into the proportionality considerations.

The *lex lata* presumption that the proportionality analysis can *only* apply when collateral damage to non-combatants is expected should no longer stand, and damage to the life and limb of a combatant should constitute a military advantage as well as incidental damage to the military operation. Under such a *lex ferenda* premise, due to their embedded military advantage as military assets and their existing value of life, combatants can be considered both a legitimate military target and collateral damage (see Figure 2) – the latter of which I will refer to as “combatant collateral damage”. Such combatant collateral damage is similar to the regular “civilian” collateral damage as incidental to the main attack but, unlike civilian collateral damage, which relates to damage to the civilian population, be it lives, limbs or civilian objects, the proposed concept of combatant collateral damage remains limited to harm to combatants as human beings and does not extend to military objects (such as tanks or aircraft). It is collateral in nature because it distinguishes between the combatants as a military asset (the military aspect) and their human value (the collateral aspect). The

109 See F. J. Hampson, above note 108. See also A. Cohen and Y. Shany, above note 104.

110 A. P. V. Rogers, “Zero-Casualty Warfare”, *International Review of the Red Cross*, Vol. 82, No. 837, 2000, p. 165.

111 R. Geiss, above note 99, p. 84.

112 See G. Solis, above note 2, p. 596, discussing “combatant collateral damage” in the context of the prohibition on using certain incendiary weapons against combatants under the Convention on Certain Conventional Weapons’ Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva, 10 October 1980.

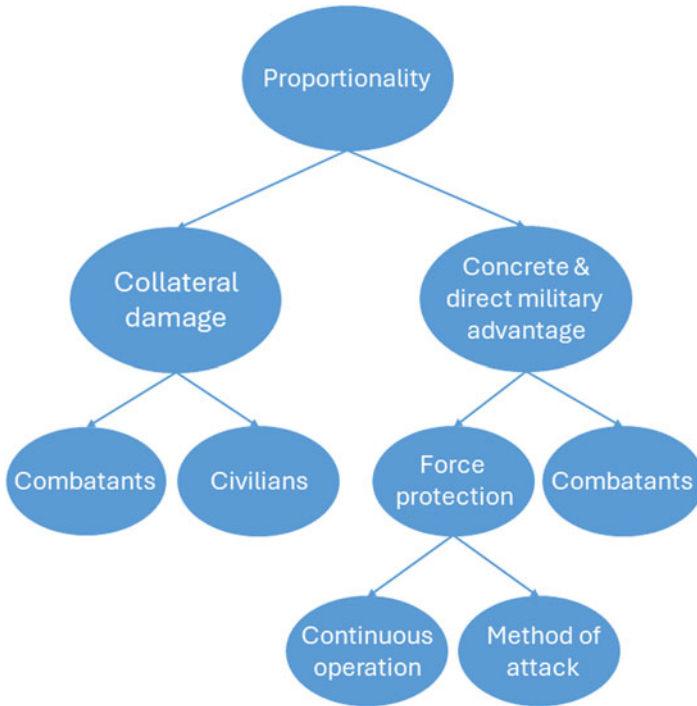


Figure 2. Proportionality *lex ferenda*.

recognition of such an additional collateral damage is, of course, not obvious and could raise questions and claims regarding its practical implications (see further discussion in the section on practical implementation below). Therefore, it is important to clarify that the combatant collateral damage would not affect the *civilian* collateral damage, but rather would add another layer to the analysis by creating a “cumulative collateral damage” evaluation. Therefore, the military commander would have to analyze the expected cumulative collateral damage and compare it to the anticipated military advantage, which includes the military necessity of attacking combatants (taking into account the combatants’ functional proximity).

Naturally, in most cases the embedded military value is significantly higher than the collateral damage inflicted on a combatant. Therefore, the higher the functional proximity, the less relevant the combatant collateral damage becomes. However, this does not mean that the combatant collateral damage should be completely overlooked. There are situations where the embedded military value of a combatant decreases (e.g. due to low functional proximity), which can affect the military advantage of attacking her – perhaps even to the point that the value of her life becomes a significant factor in the equation. In such a case the combatant collateral damage might be considered excessive in comparison to the military value derived from targeting her.

When looking at Figure 2, it is important to note that the “Combatants” under both the “Concrete and direct military advantage” and “Collateral damage” headings can be the same enemy combatants, but this does not have to be the case in every situation.

The recognition of combatant collateral damage as part of IHL would address some of the problematic outcomes of IHL such as those demonstrated in the three “equal military value” scenarios presented earlier.

In Scenario A, Target 1 has one combatant – an F-35 pilot – while Target 2 has one military object – an F-35. If we accept that combatant collateral damage should be considered, it is clear that there is a difference between the targets and that the military commander is required to choose Target 2 (the F-35) over Target 1 (the pilot). This is due to the existence of combatant collateral damage in Target 1, according to the IHL precautionary requirement to do anything feasible to avoid or at least minimize the expected collateral damage.<sup>113</sup>

In Scenario B, Target 1 has ten special forces combatants and ten civilians while Target 2 has 100 UAV operators and ten civilians, and both have equal military value.<sup>114</sup> If we accept that there is a certain value to the lives of combatants, which should be counted as combatant collateral damage, there is a clear difference in the proportionality analysis between the two targets. The cumulative overall collateral damage (civilian + combatant) in Target 2 is greater than the cumulative overall collateral damage of Target 1. This does not imply, of course, that the cumulative overall collateral damage necessarily makes the attack against Target 2 disproportionate.

In Scenario C, where Target 1 has ten combatants and twenty civilians while Target 2 has 100 combatants and ten civilians, there is a new complication that challenges the notion of cumulative collateral damage. Accepting that a certain amount of combatant collateral damage can “override” the civilian collateral damage might lead to a dangerous slippery slope, resulting in unlimited civilian collateral damage under the pretext of greater combatant collateral damage.<sup>115</sup> However, unlike the ten civilians, the 100 combatants also have a military value alongside their combatant collateral damage,<sup>116</sup> which makes the analysis in the case at hand even more complicated. The discussion on taking different approaches to the lives of combatants has developed mainly within the ranks of the just war revisionists, who claim that there is a clear hierarchy between killing civilians and killing combatants which holds that civilians maintain a higher level of protection than combatants,<sup>117</sup> and that lesser-evil considerations might lead to a different result once we take into account the lives

113 AP I, Art. 57(1). See further discussion on the relevant precautionary measures in the following section.

114 The attack is not expected to cause disproportionate collateral damage in this scenario.

115 R. Geiss, above note 99, p. 85; Stefan Oeter, “Collateral Damages – Military Necessity and the Right to Life”, in Christian Tomuschat, Evelyn Lagrange and Stefan Oeter (eds), *The Right to Life*, Martinus Nijhoff, Leiden, 2010, p. 185.

116 Z. Bohrer and M. Osiel, above note 48, p. 766; D. Luban, above note 48, p. 36.

117 Adil Ahmed Haque, *Law and Morality at War*, Oxford University Press, Oxford, 2017, pp. 85–86; Seth Lazar, *Sparing Civilians*, Oxford University Press, Oxford, 2016, p. 128; Jeff McMahan, *Killing in War*, Oxford University Press, April 2009, pp. 234–235; Helen Frowe, “The Just War Framework”, in Seth

of combatants.<sup>118</sup> From a legal perspective, however, once we acknowledge the right to life of combatants and take into account also the military value of those combatants, it is impossible to provide clear guidance on such a scenario. Therefore, combatant collateral damage might have a significant effect on the lives of combatants in Scenarios A and B, but it is unclear what the answer will be (or even should be) regarding Scenario C.

## Precautions in attack

In accordance with analysis of the previous principles (necessity, distinction, and proportionality), the distinction between civilians and combatants remains intact. Nevertheless, there are circumstances in which, under the *lex ferenda* framework suggested in this paper, a combatant's embedded military value might be reduced and the value of the combatant's life becomes a factor. In such cases, the application of certain precautionary measures, which are generally relevant to civilians under the *lex lata* framework,<sup>119</sup> might become relevant, *mutatis mutandis*, to combatants as well. Thus, there are circumstances in which the value of life of combatants would become a factor in the embedded value analysis and in both elements of the proportionality equation (concrete and direct military advantage as well as collateral damage). Under such circumstances, the required precautions need to be adjusted as well.

There are two main situations that ought to affect these precautionary measures: (1) when the military advantage of the operation is reduced due to a decrease in the embedded military value of a combatant (the “naked soldier” and “Highway of Death” examples), and (2) when the combatant's value of life becomes a factor as part of the combatant collateral damage analysis (the “equal military value” targets in Scenarios A and B). In both of these situations, we might consider taking precautionary measures to reduce the harm to the combatants. While it could be argued that this is not a deviation from the existing practice that requires avoidance of unnecessary suffering or superfluous injury to combatants, in practice, the *lex lata* implementation of these restrictions has been interpreted into limitations and prohibitions on the use of means and methods designed to cause unnecessary suffering or superfluous injuries.<sup>120</sup> This is different, of course, to the *lex ferenda* suggestion to take feasible measures to reduce harm to those on the battlefield, including, for example, giving

Lazar and Helen Frowe (eds), *Oxford Handbook of Ethics of War*, Oxford University Press, Oxford, 2015, p. 3.

118 Jovana Davidovic, “Proportionate Killing: Using Traditional Jus in Bello Conditions to Model the Relationship between Liability and Lesser-Evil Justifications for Killing in War”, in Jens David Ohlin, Larry May and Claire Finkelstein (eds), *Weighing Lives in War*, Oxford University Press, Oxford, 2017, pp. 158–159.

119 AP I, Art. 57.

120 G. Solis, above note 2, pp. 270, 325–326; Françoise J. Hampson, “Means and Methods of Warfare in the Conflict in the Gulf”, in Peter Rowe (ed.), *The Gulf War 1990–91 in International and English Law*, Routledge, London, 1993, pp. 105–107; G. S. Corn *et al.*, above note 50, p. 544; D. Akande, above note 45, p. 192.



combatants the opportunity to surrender,<sup>121</sup> refraining from launching an attack expected to cause disproportionate combatant collateral damage, or choosing means and methods of attack that will minimize such damage to a proportionate scale.<sup>122</sup>

Within the context of precautions, the main question concerns the weight given to the value of combatants’ life as part of the decision-making. Unlike civilians, for whom the point of departure is that they are protected from direct attack, combatants are considered lawful objects of attack and, therefore, under “regular” circumstances there is no requirement to avoid attacking them – only to prevent superfluous injury and unnecessary suffering.<sup>123</sup> However, in situations of reduced military value, when taking into account the value of life of the combatants, the outcome can change.

The reduced military value does not affect the value of life of a combatant, but it does affect the ratio between embedded military value and the value of life.<sup>124</sup> In an attempt to illustrate this process, I will use a point-based system to demonstrate how the ratio is affected. It should be noted that such an illustration is intentionally meant for simplification and does not aim to assign a numeric value to lives, to dehumanize any person (especially in a paper which is focused on the humanization of combatants), or to suggest that this is how the decision-making process takes place. For the purposes of this illustration, I am assuming that the values are translated to an arbitrary numeric index system, in such a manner that if, in a regular situation, the value of life equals a constant of 10 points and the military value equals 90 points, then the ratio is 1:9 toward necessity. However, in cases where the military value is reduced to 60 or 30 points or even 5, the ratio between the combatant’s value of life (a constant 10 points) and the military value changes accordingly toward the value of life. The lower the ratio of military value to value of life of the combatant gets, the stronger the relevancy of using precautions aimed at reducing the damage to the combatant.

It could be argued that, theoretically, due to the recognition of the value of life of combatants, feasible precautions should be taken at all times, just as with civilians, unless circumstances do not allow it. The result of such an approach is a requirement to take all feasible measures to limit the harm to combatants, including, *inter alia*, choosing the “lesser evil” (for example, an obligation to capture rather than kill when such an option is operationally available).<sup>125</sup> However, since precautionary measures are part of the balance between military necessity and humanity, such a balance presumably already exists in IHL under the requirement to address the relevant precautions for civilians and to limit the means and methods allowed to be used against combatants. Claiming that there is an obligation to do everything feasible to prevent or limit damage to adversary

121 C. A. J. Coady, above note 79, p. 157.

122 Based on AP I, Art. 57(2)(a), with appropriate changes.

123 G. Blum, above note 2, p. 85; A. Quintin, above note 26, pp. 254–257.

124 Z. Bohrer and M. Osiel, above note 48, p. 767.

125 See discussion on the requirement to capture rather than kill in the following section.

combatants would, so the argument goes, tilt the scale too strongly toward humanity and against military necessity and most likely prevent the balance that allows for the existence of IHL on the battlefield.<sup>126</sup> Therefore, rather than requiring the employment of such precautions toward combatants at all times, it is suggested here that the combatant's military necessity value will be taken as part of the considerations. Thus, the smaller the necessity, the stronger the rationale for and reasonability of employing precautionary measures toward the adversary combatant.

If we rely only on the existing analysis, the only situation where the burden might get overturned under IHL would be in situations of *hors de combat* where the adversary combatant is protected from direct targeting.<sup>127</sup> However, such an analysis does not take into account the changing threat posed by that combatant while not *hors de combat*,<sup>128</sup> or the appropriate military value from an attack directed against that combatant. By taking these aspects into consideration, adversary combatants will become more protected under relevant circumstances.

It should be noted that this analysis constitutes only part of the complete decision-making process preceding an attack, which will involve other relevant considerations of military advantage, force protection and proportionality that could have an effect over the decision to attack and the means and method of attack to use.<sup>129</sup>

## Humanity and unnecessary suffering

The main and most direct measure related to combatants stemming from the principle of humanity is the prohibition against causing superfluous injury or unnecessary suffering to combatants.<sup>130</sup> The interpretation of this restriction varies from the conventional approach posing acceptable limitations on the means and methods of warfare to the more controversial approach requiring parties to the conflict to do everything feasible to minimize the harm caused to combatants. This includes the adoption of practices not explicitly articulated in any international agreement, such as preferring the capturing rather than the killing of adversary combatants where feasible.<sup>131</sup>

126 Frédéric Mégret, "The Limits of the Laws of War", in Bardo Fassbender and Knut Traisbach (eds), *The Limits of Human Rights*, Oxford University Press, Oxford, 2020, pp. 290–292.

127 G. Solis, above note 2, p. 188; Marco Sassòli and Laura M. Olson, "The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 605–606; G. Blum, above note 2, p. 108.

128 G. Blum, above note 2, p. 108.

129 This model might raise questions and criticism about its manageability. For further discussion, see the section below on "Concerns about Practical Implementation".

130 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 138 CTS 297. 11 December 1868 (St. Petersburg Declaration); Hague Regulations, above note 5, Art. 22; AP I, Art. 35.

131 J. Pictet, above note 66, p. 75.

The ongoing academic discussion is mainly focused on preventing unnecessary suffering within current IHL norms.<sup>132</sup> According to the common understanding of the *lex lata*, the silence of IHL with regard to avoiding an attack against combatants when such an attack is unnecessary is not accidental, and no additional restrictions are required regarding attacks on combatants.<sup>133</sup> However, when the value of combatant life is introduced into that ongoing analysis, the notion of using less harmful measures would tip the scales more toward taking additional measures to limit any unnecessary harm to adversary combatants.<sup>134</sup> This will complete the internalization of the right to life of combatants into IHL. This does not mean that the scale will shift from one extreme to another, but rather that IHL will place a stronger emphasis on minimizing death or injury to combatants. Such an approach will enable the models presented in this paper, such as the reduced military value of adversary combatants and the minimization of combatant collateral damage, to be realized.

## Implications

The purpose of this section is to inspect and analyze the practical value of applying the suggested combatant value of life framework, as an integral part of IHL principles, to complicated situations.

Similarly to the preceding analysis, the following discussion will focus on the implications for both adversary and own combatants.<sup>135</sup> The main aspects regarding these two groups of combatants are different due to the list of considerations that need to be taken into account. The main focus for adversary combatants is on when they are allowed to be targeted and the relevant aspects, such as capture rather than kill, proportionality, and necessity, that are derived from that. Regarding one's own combatants, the focus is completely different and is directed at the requirement or obligation to protect and preserve the lives of combatants, including aspects such as force protection and proportionality.

## Adversary combatants

In order to explore the integration of the combatant value of life of an adversary into IHL principles, we have to take into account the framework within which the decision as to whether that person is a legitimate target is being made. This part will focus on three core aspects:

132 G. Blum, above note 2, pp. 71, 78; G. S. Corn *et al.*, above note 50, p. 544.

133 D. Akande, above note 45, p. 192.

134 G. Blum, above note 2, pp. 116–117.

135 There could also be a reference to peacekeeping forces, but in the context of their operations they can operate either under a law enforcement paradigm or an IHL paradigm, and in the latter they would be considered to be adversaries in some circumstances. See Magdalena Pacholska, *Complicity and the Law of International Organizations*, Edward Elgar, Cheltenham, 2020, pp. 55–60.

1. Capture rather than kill: does IHL impose an obligation to capture an adversary combatant instead of wounding or killing that combatant under the requirement to minimize unnecessary suffering?
2. Circles of proportionality: what considerations affect the proportionality analysis with regard to taking collateral damage and the military advantage value of adversary combatants into the proportionality equation?
3. Circles of functional proximity: what considerations affect the military necessity of targeting a combatant, especially taking into account the combatant's functional proximity, and to what extent are these considerations relevant with regard to the battlefield, the combatant's value of life, and distance from the battlefield?

The analysis of the targetability of an adversary combatant has two main elements: the functional proximity and the military value. The notion of functional proximity, which combines the cumulative effect of the geographical proximity and the operational proximity of the combatant, has been explained.<sup>136</sup> Military value is composed, *inter alia*, of the rank and operational activity of the combatant, regardless of that combatant's proximity to the battlefield.

The cumulative value of the military value and the functional proximity can lead to different results. However, Figure 3 provides some understanding of and guidelines for the actual targetability of a combatant.

Figure 3 provides four sections of analysis. The following discussion will address these four areas with an exemplary combatant from each section.

Area A of the chart represents immediate targets. Combatant (A)ndrew has high functional proximity to the battlefield and has a high military value, such as a Green Beret combatant or a Predator drone operator.

Area B represents low functional proximity to the battlefield but high military value. Combatant (B)arbara is located away from the battlefield and is not commanding any active operation. She is a four-star general whose actions do not have a direct effect on the battlefield.

Area C represents high functional proximity to the battlefield but low military value or activity. Combatant (C)huck is geographically very near to the battlefield, but his activities do not directly contribute to the operating forces and do not provide high value to the general combat activity. Chuck can be, for example, an IT technician providing basic support for the computers in a military base located on the battlefield.

Area D of the chart represents those who are located away from the battlefield and whose activity or value is considered low. Combatant (D)onald, for example, is the military cook on the distant military base where Chuck received his training and qualifications.

There is no comparison between the necessity of the different combatants on a general basis. One could provide different scenarios in which the military necessity of targeting Barbara at a certain point in time would be higher than that of targeting

136 See above in the discussion on military necessity.

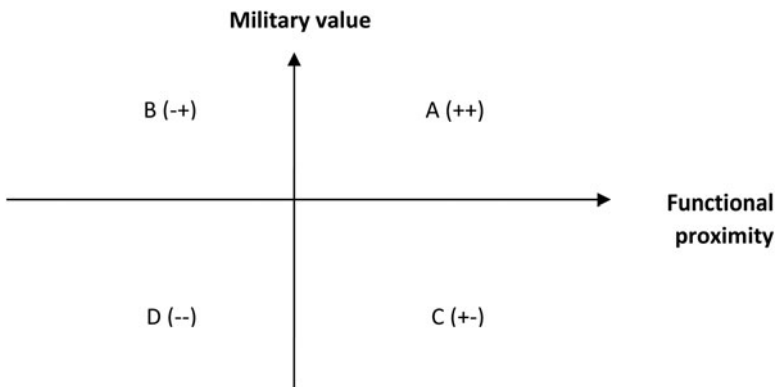


Figure 3. Analysis of targetability.

Andrew, Chuck and Donald, and others in which targeting Andrew would be considered of lower necessity than targeting Chuck and Barbara, and so on.

### *Internal proportionality test: Capture rather than kill*

A great deal of the discussion on the need to humanize the treatment of combatants is focused on whether there is a requirement to capture instead of kill an adversary combatant when feasible.<sup>137</sup> This discussion is based on the humanity principle and sets limits on causing unnecessary suffering.<sup>138</sup> This principle has led some scholars to conclude that if we can choose between wound, capture or kill, we ought to choose the lesser evil (assuming that the military advantage from the operation remains the same).<sup>139</sup>

The notion of capture rather than kill was also incorporated into Section IX of the ICRC Interpretive Guidance.<sup>140</sup> Although under the current IHL doctrine, preferring capturing over killing of adversary combatants has not been accepted,<sup>141</sup> when taking into account the combatant value of life and its application under IHL principles as suggested in this paper, the interpretation of IHL towards the capture rather than kill norm would be modified.

By introducing the notion of the human value of a combatant, the discussion changes from “necessity versus humanity”, where necessity stands as a

137 ICRC Interpretive Guidance, above note 6, pp. 77–82.

138 St. Petersburg Declaration, above note 130.

139 J. Pictet, above note 66, p. 75. See also Ryan Goodman, “The Power to Kill or Capture Enemy Combatants”, *European Journal of International Law*, Vol. 24, No. 3, 2013, p. 820; Gabriella Blum, “The Laws of War and the ‘Lesser Evil’”, *Yale Journal of International Law*, Vol. 35, No. 1, 2010, p. 57.

140 ICRC Interpretive Guidance, above note 6, p. 80; N. Melzer, above note 42, pp. 13–16. See also W. Hays Parks, “Part IX of the ICRC ‘Direct Participation In Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *NYU Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 783–785.

141 W. H. Parks, above note 140. See also Marko Milanovic, “When to Kill and When to Capture?”, *EJIL: Talk!*, 6 May 2011, available at: [www.ejiltalk.org/when-to-kill-and-when-to-capture/](http://www.ejiltalk.org/when-to-kill-and-when-to-capture/); G. S. Corn *et al.*, above note 50.

general umbrella principle that sets limitations on the use of force and at most requires choosing the lesser evil, to an analysis that I refer to as the “necessity versus human value” (NvHV) test. The NvHV test is a more specific comparison between the military necessity of the adversary combatant and the life value of the adversary combatant. Recall that the life value of an adversary combatant remains the same regardless of their position on the targetability analysis shown in [Figure 3](#); the basic value of life for combatants Andrew, Barbara, Chuck and Donald is equal.

The NvHV test holds that attacking an adversary combatant is prohibited when the harm to the human value of the combatant exceeds the military advantage resulting from using force. The outcome is an internal proportionality test in which the value of life of the combatant is on the one side of the equation, and the available methods for use of force are on the other. Hence, according to this analysis, if by killing an adversary combatant (either directly or as combatant collateral damage) the threat to the life of that combatant is excessive in relation to the military advantage, such killing is considered a violation of that combatant’s right to life. However, by using less lethal means and methods of attack (such as more accurate weapons, or capturing instead of killing), the threat to the adversary combatant’s life might decrease and become less excessive, thus enabling the operation and giving the commander operational alternatives. It should be emphasized that the NvHV test requires the commander to choose an operational alternative (a less lethal approach) only when the threat to the life of the combatant (the expected combatant collateral damage) is excessive compared to the military advantage.<sup>142</sup> In other cases, there would be no requirement to apply such operational alternatives.

This internal proportionality test has further implications. Since combatants are considered legitimate targets, their embedded military value must be taken into account as part of the military advantage of the attack. Issues such as force protection and the potential aggravated risk to the attacking combatants must also be considered by the commander, alongside the means and methods of attack available at the time. However, once the complete analysis shows that the combatant collateral damage could be reduced from excessive to proportionate, the commander can either launch the operation under these restrictions, using a more accurate or restrained weapon, or issue a capture order, or cancel the attack. Lastly, since armed conflict situations can change very quickly, if circumstances change during the operation, the orders must change accordingly.

In the “naked soldier” scenario, there is enough time to consider the feasible alternatives. Therefore, if we use the point-based illustration system as was done above, the value of the life of the German soldier equals 10 points,<sup>143</sup> and the British soldier must consider the military value of attacking him. The

142 Or combatants, in the case of more than one combatant. In such a case we will refer to cumulative combatant collateral damage, as mentioned earlier in this paper.

143 As mentioned above, the use of a point-based system is done to illustrate and simplify the situation rather than to set a numeric value on the life of combatants or on their embedded military value.



British soldier has no obligation to wait for the German soldier to regain control over his weapon before killing him.<sup>144</sup> However, since at the time the military value of the German soldier is low, and there is no threat posed, the military value of attacking that soldier could be considered low enough that the complete threat to his value of life by killing him would be excessive in relation to his military value, and that alternative, less lethal measures should therefore be explored.<sup>145</sup>

In the “Highway of Death” scenario, in turn, the US forces would have had to evaluate the threat of sporadic shots coming from the Iraqi convoy. In accordance with the NvHV test, the military commander would have to take all relevant dimensions into account, including the role of the withdrawing forces, the estimation that the Iraqi forces would gather for a high-intensity fight, and the timing of the attack (near the end of the conflict). The military commander would have to measure this as part of the military necessity and anticipated military advantage analysis, compared with the expected combatant collateral damage. If actual damage was expected, then the combatant collateral damage would be equal to 4,000 points (400 Iraqi combatants, each of whom has an assigned life value of 10 points for the purpose of the illustration). If the expected combatant collateral damage was excessive compared to the military advantage, less lethal measures should have been deployed.

The outcome of the internal proportionality test is only relevant when the result is disproportionate; then it is up to the military commander to decide whether to use less lethal means and methods sufficient to re-balance the internal proportionality equation (including cancelling the attack). The rationale behind the internal proportionality test is based on the embedded value and the principle of distinction. Practically, the outcome of the internal proportionality test will most likely be disproportionate when both the military advantage of the operation and the targetability of the adversary combatant are at their lowest values.

### *Circles of proportionality*

After considering the internal proportionality test, it is important to take a step back and look at the bigger proportionality picture. Throughout the discussion, several proportionality tests relevant to situations of attacking adversary combatants have been mentioned. Now it is time to set things into order of operation. For that purpose, I will set out the interplay between the different relevant tests related to an operation of targeting an adversary combatant.

The main proportionality test is conducted only when an attack is expected to cause civilian collateral damage, and only after all relevant precautionary measures to avoid or at least minimize the damage to the civilian population have been taken. Once those precautionary measures are exhausted, the internal

144 G. Solis, above note 2, p. 5.

145 This is not to say that other legitimate military considerations such as force protection should not be taken into account as discussed earlier in this paper. If using less lethal measures would impose no additional risk on one’s own forces, it would only emphasize the need for the use of such measures. See C. A. J. Coady, above note 79, p. 157.

proportionality test (regarding adversary combatants) is considered to decide the final means and methods of attack. Once this twofold step is completed, the main proportionality test is analyzed by comparing the concrete and direct military advantage anticipated with the expected civilian collateral damage.

### *Circles of functional proximity*

Both the internal proportionality test and the main proportionality test must take into account the targetability value of the adversary combatants. Unlike the current military necessity test, which is very binary, the targetability value has a direct correlation to the dimensions at the core of the military necessity evaluation: role, temporal, geographical, and functional proximity. Naturally, each of these dimensions plays an important part in the appropriate evaluation, but none of them overrules the others. For example, the further from the battle zone, the smaller the geographical proximity, and the bigger the burden on the military commander to analyze the functional proximity in order to decide which situations require the application of the internal proportionality test.

This requirement ensures that the analysis remains practical. Under the reality of warfare, including the fog of war and the chaos of the battlefield, the ability of the military commander to make a complete analysis of the actual necessity of the combatant might be limited. Therefore, it is possible to assess a high targetability value for Chuck regardless of his low role value as an IT technician because his high proximity to the battlefield might reasonably lead the commander to conclude that he has high functional proximity.

The further we move from the fog of war and the chaos of the battlefield (and thus the further from geographical proximity), the bigger the burden on the commander to thoroughly examine the functional proximity. Hence, for Barbara and Donald, and for Andrew the Predator drone operator, the functional proximity should be more carefully analyzed than for Andrew the Green Beret and even Chuck the IT technician, who are located within the battle zone.

This does not excuse the requirement for evaluation on the battlefield. A commander is always under the obligation to examine the situation on the ground, and therefore the functional proximity and the military value of the attack ought to be examined whenever possible. This is much like other factors that ought to be considered in the midst of the battle, such as the concrete and direct military advantage to be gained, the collateral damage from an attack, the available means and methods of warfare and the feasible precautions that should be deployed.

### **Own combatants**

When dealing with a party's own combatants and their right to life, there are two main considerations relating to the requirement to protect the right to life. The first is the protection and minimization of risk to combatants,<sup>146</sup> and the second

146 R. Geiss, above note 99, p. 71.

is to take relevant measures to ensure (or increase) the protection of combatants from potential superfluous injury or unnecessary suffering by setting limitations on the commander in certain situations of deployment.

### *Force protection*

When launching an attack, forces must make decisions relating to different aspects of the attack. Among these considerations are the legality of the target, the means and methods of attack, applicable precautionary measures, and questions of proportionality. Military commanders often have to consider how to minimize risks for the civilian population in order to discharge their obligation to avoid or decrease civilian collateral damage resulting from the operation. At the same time, since combatants have a non-derogable right to life, commanders also have a responsibility to minimize the risk to their own soldiers and to refrain from arbitrarily depriving them of that right. However, unlike requirements for protecting the civilian population and avoiding civilian collateral damage, the current IHL framework does not provide any clear and concrete guidelines and restrictions on force protection.<sup>147</sup>

The main analysis of force protection focuses on the concrete and direct military advantage under the proportionality equation.<sup>148</sup> However, with the introduction of the combatant collateral damage concept, it could be argued that one’s own combatants’ lives should also be included in the combatant collateral damage calculation. The outcome of such a claim would therefore be that the attacker’s own forces’ combatant collateral damage gets included in the force protection analysis. This could lead to the same slippery slope of unlimited civilian (and cumulative) collateral damage among the adversary that the objectors of including force protection as part of concrete and direct military advantage refer to.<sup>149</sup> On the other hand, it could provide a justification for choosing certain methods of warfare that decrease the threat to one’s own combatants even when such protection does not offer a concrete and direct military advantage.<sup>150</sup> The challenge would be to quantify the anticipated civilian and combatant collateral damage in such scenarios and compare it to the expected concrete and direct military advantage.<sup>151</sup>

Force protection can come in many forms, such as using more careful methods of attack and reducing the risk to the attacker’s own combatants by using, for example, high-altitude bombing<sup>152</sup> or long-distance shelling,<sup>153</sup> as well

147 Some might argue that the rules on the protection of civilians are not very clear, but IHL does provide us with clear guidance and restrictions.

148 R. Geiss, above note 99, p. 71; Z. Bohrer and M. Osiel, above note 48, p. 774; Y. Dinstein, above note 58, pp. 106, 168.

149 R. Geiss, above note 99, pp. 85–87; S. Oeter, above note 115, p. 185.

150 See above in the discussion on proportionality.

151 See Z. Bohrer and M. Osiel, above note 48, pp. 756–757 (comparing and prioritizing the lives of combatants and civilians from both sides); D. Luban, above note 48, p. 37.

152 R. Geiss, above note 99, p. 72; Y. Beer, above note 68, p. 821.

153 R. Geiss, above note 99, p. 72.

as avoiding providing advance warning,<sup>154</sup> but also by active protection of those combatants, such as using force to save the lives of besieged combatants or to prevent the capture of a combatant.<sup>155</sup> Military commanders can also use force protection considerations to cancel an operation that they deem overly dangerous to their own combatants. Therefore, to include force protection measures as part of the proportionality equation, force protection has to be incorporated into the concrete and direct military advantage and combatant collateral damage parts of the equation, but it cannot receive any priority over the obligations towards civilians under IHL.<sup>156</sup>

### *Secondary proportionality test*

An affirmative decision to place forces in situations where they are at a higher probability of risk is an essential part of being a commander – but when is the risk is too high, and what are the alternative options available to the commander under such circumstances? There are situations in which the commander is required to consider the means and methods deployed in order to minimize the risk to her own combatants, and is even prohibited from deploying the force due to an obligation to ensure the combatants’ right to life. A relevant example of this situation is the attempt of the Japanese 3rd Army to attack and gain control over Port Arthur in August 1904, as part of the Russo-Japanese War. Ignoring adequate advice on the appropriate mode of attack, General Nogi Maresuke sent his ill-equipped forces to storm Port Arthur as “human bullets” and suffered a significant loss of 18,000 soldiers (almost a third of his forces) in one day. A more current and relevant example would be the decision of Russia to send “poorly trained mobilised reservists [who are] increasingly reliant on antiquated equipment” to Ukraine,<sup>157</sup> leading to, arguably, significant losses of lives of Russian combatants.<sup>158</sup>

The basis for this model is the interaction between IHL and IHRL within the context of the right and value of the life of combatants towards whom, as they are State agents, the State has IHRL obligations.<sup>159</sup> Since existing IHL norms do not regulate the entire framework between the State and the military, on the one hand, and the combatants as persons with intrinsic life value, on the other, we ought to explore how IHRL can fill that gap within the context regulated by IHL – namely, during armed conflicts. IHRL provides the State, and therefore the

154 AP I, Art. 57(2)(c): “effective advance warning shall be given of attacks which may affect the civilian population, *unless circumstances do not permit*” (emphasis added).

155 See Ruth Margalit, “Hadar Goldin and the Hannibal Directive”, *The New Yorker*, 6 August 2014, available at: [www.newyorker.com/news/news-desk/hadar-goldin-hannibal-directive](http://www.newyorker.com/news/news-desk/hadar-goldin-hannibal-directive).

156 R. Geiss, above note 99, p. 74; A. A. Haque, above note 117, pp. 85–86; S. Lazar, above note 117, p. 128; J. McMahan, above note 117, pp. 234–235.

157 UK Ministry of Defence Official Twitter Account, 14 May 2023, available at: <https://twitter.com/DefenceHQ/status/1657643236989517825>.

158 Kyiv Independent Twitter Account, 14 May 2023, available at: <https://twitter.com/KyivIndependent/status/1657666886585274369>.

159 UKSC, *Smith*, above note 32, para. 71.

military commander, with positive and negative obligations regarding the right to life of the combatants.<sup>160</sup> Those obligations include the responsibility to ensure the safety of the combatants by different measures, including, *inter alia*, providing them with proper training and equipment,<sup>161</sup> and protecting them from unlawful killings.<sup>162</sup>

There has yet to be a recognition of a general positive right to life of one’s own combatants in the form of an obligation to protect the lives of combatants from operational risks.<sup>163</sup> However, some recognition that positive obligations must be given effect “where it would be reasonable to expect the individual to be afforded the protection of [Article 2 of the European Convention on Human Rights]” has already been given by the UK Supreme Court in the *Smith* case.<sup>164</sup> Moreover, a commander must still operate within the framework of Article 6 of the International Covenant on Civil and Political Rights, which prohibits causing arbitrary deprivation of the right to life of his or her combatants.<sup>165</sup> Thus, in accordance with the recognition of the value of life of the combatants, I argue that the State, through the commander, must apply the IHRL proportionality test and thus prevent unnecessary threats to the lives of its own combatants. Since risk is an embedded element in the role and status of combatants,<sup>166</sup> the implementation of this obligation must be interpreted within the context and framework of IHL and the reality of an armed conflict.

This obligation exists when the evaluated risk to the combatants is found to be excessive in comparison to the expected gain from the operation. I suggest framing this analysis as an IHL “secondary proportionality test”. In this secondary proportionality test, the expected damages to one’s own combatants are taken as a form of combatant collateral damage – “secondary collateral damage” – while the other side of the equation is the purpose of the operation – the anticipated military advantage to be gained.

Combatants are expected to take some risks, and the mere expectation that some, most or even all combatants from the deployed forces will be wounded, injured or even die does not automatically mean that the secondary collateral damage is excessive. The risk and damage to one’s own combatants has to be evaluated by considerations such as the situation on the ground, the differences in force power, the available weaponry and support (such as aerial or gunnery support), and the training of the deployed force. The other side of the equation is the anticipated military advantage to be gained from the operation. In situations where, on the one hand, the evaluated secondary collateral damage (the risk to

160 David S. Goddard, “Applying the European Convention on Human Rights to the Use of Physical Force: Al-Saadoon”, *International Law Studies*, Vol. 91, 2015, p. 420.

161 See UKSC, *R. (Smith) (FC) v. Secretary of State for Defence*, [2010] UKSC 29, 2010, para. 195.

162 D. S. Goddard, above note 160, p. 423.

163 G. Blum, above note 2, p. 86.

164 UKSC, *Smith*, above note 32, para. 76.

165 General Comment 36, above note 9, para. 64.

166 M. Walzer, above note 27, pp. 136, 155–156; UKSC, *Smith*, above note 32, paras 61–62; ECtHR, *Soering*, above note 32, para. 439; House of Lords, *R (Gentle and Another)*, above note 32, para. 9; ECtHR, *Stoyanovi*, above note 32, para. 61; P. Rowe, above note 32, p. 30.

one's own combatants) is very high, and on the other hand, the military gain from the operation is very low, we can find that the expected secondary collateral damage is excessive and the operation is disproportionate in accordance with the secondary proportionality test. In such a scenario, which could be seen in General Nogi's decision to choose the less effective alternative at Port Arthur, the order could be considered as arbitrary deprivation of the lives of the combatants.<sup>167</sup> In these cases, the responsibility of the State to protect the right to life of the combatants as persons who are under the responsibility and certain control of the State is implemented as part of the military commanders' decision-making process.

I refer to this test as the secondary proportionality test because the traditional civilian proportionality test is the primary test. The commander can always decide to adjust the order to protect his/her combatants and must refrain from executing disproportionate attacks. However, it is important to clarify that the secondary proportionality test would address the discretion exercised by the commanders regarding the risk posed to their combatants. The test does not affect the (concrete and direct) military advantage or, therefore, the framework of excessive cumulative collateral damage.

It could be argued that the secondary proportionality test should be conducted only after the commander has exhausted the relevant precautions analysis and has conducted the main proportionality test, thus choosing the relevant means and methods of attack from the available alternatives to verify that the chosen *modus operandi* is selected from within a legitimate bank of operational options. However, is it not inconceivable that the commander will conduct the secondary proportionality test first to ensure that there are indeed operational alternatives that do not pose excessive risks to his forces, and then consider the required precautionary measures and analyze the main proportionality test.<sup>168</sup>

## Concerns about practical implementation

Introducing obligations derived from the right to life into the process of *jus in bello* can involve challenges regarding manageability and practical implementation.<sup>169</sup> For example, the introduction of new concepts such as combatant collateral damage and functional proximity elevates the level of complexity of decisions on the battlefield. Combatants and military commander are already required to make complicated decisions under the fog of war; requiring them to evaluate the adversary combatants' necessity versus the value of lives might just make this too

167 P. Rowe, above note 32, p. 138.

168 Much like IHL requires attackers to first take the relevant precautions to avoid collateral damage and only if that option is not available does the question of civilian collateral damage and proportionality become relevant. See Geoffrey S. Corn, Ken Watkin and Jamie Williamson, *The Law in War: A Concise Overview*, Routledge, London, 2018, p. 151.

169 G. Blum, above note 2, p. 74.

complicated and thus impractical.<sup>170</sup> Obtaining more accurate intelligence about the military value of adversary combatants might require additional investment and development of better technological tools. Such requirements might emphasize the already existing differences in expectations depending on the level of sophistication of a military.<sup>171</sup>

Naturally, this is a *lex ferenda* development that cannot take place overnight. However, much like the discussion over direct participation in hostilities has developed and improved practice in that area, the same can happen with the right to life of combatants. Much depends on the internalization of the new interpretation into the training processes of combatants.<sup>172</sup> Moreover, the analysis of the decision-making is done in accordance with the circumstances at the time and the information available to the combatants at the time, so in the midst of conflict, where the fog of war is at its most opaque, geographical proximity will play a more significant role in the evaluation of military necessity at the time of the attack, since as we go further from the battlefield, the fog of war becomes clearer.

Moreover, since I suggest that the value of life of combatants should be incorporated into IHL, it might be unclear what the outcome would be of IHL violations of wrongfully attacking combatants. Not every IHL violation constitutes a war crime, and it seems implausible to assume that attacking combatants would constitute a grave breach. Therefore, individual criminal liability will not be at the focus of this development, and States, on the other hand, could be affected due to their responsibility for conduct infringing both IHL and IHRL.

## Conclusions

By joining military forces, combatants accept certain legitimate restrictions over the exercise of their right to life since their role inherently entails extended risk. Under the IHL regime, combatants constitute a lawful target, and under a conservative reading of the rules, combatant casualties are not to be included in the proportionality analysis. However, although a combatant's right to life is decreased and restricted, it should not and cannot be completely discarded. Combatants have a right to life and an inherent human value that they cannot be deprived of. This value should be taken into account and protected from arbitrary deprivation. The normative and practical legal framework proposed in this article

170 Z. Bohrer and M. Osiel, above note 48, pp. 788–789; Andrew Clapham, “The Limits of Human Rights in Times of Armed Conflict and Other Situations of Armed Violence”, in Bardo Fassbender and Knut Traisbach (eds), *The Limits of Human Rights*, Oxford University Press, Oxford, 2020, p. 308; G. S. Corn, above note 72, p. 83: “Attempting to extend human rights based use of force standards into the realm of armed conflict is therefore not only illogical, it is operationally debilitating.”

171 G. Blum, above note 2, p. 106.

172 Adil Ahmed Haque, “Killing in the Fog of War”, *Southern California Law Review*, Vol. 86, No. 1, 2020, p. 115; Jørgen Weidemann Eriksen, “Should Soldiers Think Before They Shoot?”, *Journal of Military Ethics*, Vol. 9, No. 3, 2010, p. 214; G. Blum, above note 2, p. 74.



will allow for an important development and modification that includes the combatant value of life within the basic framework of IHL, without changing the basic principles but rather by adjusting their interpretation. There are a few ways to incorporate combatants' value of life into the legal framework – both adversary combatants and one's own, as part of the military commander analysis of the military situation. Two internal tests take into account the combatant value of life in the course of a military operation – the adversary combatant's collateral damage test vis-à-vis the adjusted military value, and the secondary proportionality test concerning one's own combatants. I have also addressed the use of such value of life within the paradigm of force protection.

None of these changes is trivial, and they can be subject to valid criticism. Recognizing the concept of combatant collateral damage and military advantage would mean that IHL is moving even further into the uncertainty of different proportionality tests, adding more weight and burden to the complicated decision-making process of military commanders. Nevertheless, if such a development means that the value of the lives of combatants is duly considered and that the outcomes of "equal military value" scenarios (especially Scenario A, where the choice is between a person and an object) improve, it will be worth it.

This article has included analysis of the *de facto* military necessity of the adversary combatant, combatant collateral damage as part of the proportionality analysis, and the internal proportionality test as part of the precautions aimed at preventing unnecessary suffering of adversary combatants. On the other side of the discussion, there are relevant limitations on force protection inclusion under concrete and direct military advantage and the secondary proportionality test setting limits on the deployment of own combatants to unnecessary missions. The combination of all these suggested developments could reduce unnecessary suffering on the battlefield and ensure better respect for the right to life of all parties to the conflict – both civilians and combatants.